No. 91-1546

In the Supreme Court of the United States

OCTOBER TERM, 1992

BOB SLAGLE, APPELLANT

v.

LOUIS TERRAZAS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a court-ordered interim redistricting plan for state legislative districts violates constitutional standards if it contains a total maximum population deviation of 9.98%.

2. Whether the court-ordered interim redistricting plan should be vacated because the conduct of one of the members of the three-judge district court allegedly created an appearance of impropriety.

3. Whether a court-ordered redistricting plan that is allegedly based primarily on a proposed plan submitted by a party to the litigation is subject to the preclearance requirement of Section 5 of the Voting Rights Act, 42 U.S.C. 1973c.

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STATEMENT

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

1. Appellant Bob Slagle appeals from orders of a three-judge district court directing that primary elections for the Texas State Senate be held under a court-ordered redistricting plan. The United States previously filed a brief as amicus curiae in response to an invitation from the Court urging summary affirmance of an appeal filed by the State of Texas from the same orders. See Brief for the United States as Amicus Curiae in *Richards* v. *Terrazas*, No. 91-1270. On June 29, 1992, this Court summarily re-

jected the claims raised in that appeal. *Richards* v. *Terrazas*, 112 S. Ct. 3019 (1992).

This appeal raises three additional issues. Many of the facts underlying those issues are set out in our brief as amicus curiae in No. 91-1270. We add the following:

2. In response to the three-judge district court's request that the parties submit proposed interim redistricting plans for the Texas State Senate (J.S. App. 9a-10a), appellees Terrazas, Angelo, and Craddick (the Terrazas appellees) submitted a plan prepared by the Texas Fair Redistricting Committee (the "FAIR plan"). J.S. App. 4a. The State of Texas submitted a different redistricting plan for the state senate, known as the *Quiroz* plan. 91-1270 J.S. at 4. Also before the district court was the redistricting plan for the state senate that had been adopted by the state legislature in May 1991. That plan, known as S.B. 31, had never taken effect, because the State withdrew its submission of S.B. 31 to the Department of Justice for preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. J.S. App. 8a-9a, 25a-26a.

In crafting its interim plan, the district court began with S.B. 31 and modified it in those areas of the State in which it found likely violations of Section 2 of the Voting Rights Act, 42 U.S.C. 1973. J.S. App. 26a-34a. Those modifications, in turn, necessitated changes in districts that were not themselves found to be in likely violation of Section 2. J.S. App. 34a. Nonetheless, the district court stated that "every attempt was made to place as many counties in the interim districts in the same numbered district as they would have been under SB 31." *Id.* at 34a-35a. Moreover, the court noted that "fully half of the Senate

Districts [under its interim plan], namely those in West and East Texas, are substantially the same as under SB 31." *Id.* at 35a.

The interim plan ultimately adopted by the district court created state senatorial districts with a maximum population deviation of 9.98%. J.S. 9. The district court did not explain the reasons for that deviation, but did state that immediate issuance of its interim plan was required in order "to provide for the holding of elections in Texas without delay and in accordance with existing state law." J.S. App. 42a.

3. On July 1, 1991, appellant had filed a motion to recuse United States District Judge James R. Nowlin, one of the members of the three-judge district court, on the ground that Judge Nowlin's past political affiliations and his testimony ten years earlier in another redistricting case created an appearance of partiality. J.S. 3-4; Application for Stay, Appendix, Attachment E. That motion was denied on July 23, 1991. Mot. to Dis. 12.

Thereafter, on January 23, 1992—the same day on which appellant filed his notice of appeal to this Court—appellant filed a second motion to recuse Judge Nowlin, asserting for the first time that Judge Nowlin had improperly permitted State Representative George Pierce, a state senatorial primary candidate, to participate in drawing the court-ordered plan, thus creating an appearance of impropriety sufficient to require recusal. J.S. 3-4. Judge Nowlin denied that motion on February 5, 1992. *Id.* at 4; Application for Stay, Appendix, Attachment F, at 1-2.

Appellant then filed a motion on February 7, 1992, asking that the full three-judge district court review

Judge Nowlin's refusal to recuse himself. Judge Nowlin denied that motion as well. J.S. 4. Appellant did not file a notice of appeal from either of those orders.

On February 10, 1992, in response to a complaint against Judge Nowlin filed with the Fifth Circuit Judicial Council, the Chief Judge of the Fifth Circuit appointed a special committee of judges to investigate the complaint. On May 5, 1992, the special committee submitted its report to the Judicial Council, recommending that Judge Nowlin be reprimanded for creating an appearance of impropriety by permitting Representative Pierce to assist in revising the court's redistricting plan. See Motion for Establishment of Fifteen-Day Deadline for Submission of the Views of the United States in *Richards* v. *Terrazas*, No. 91-1270, Appendix. The Judicial Council adopted the committee's findings and recommendations and reprimanded Judge Nowlin on May 15, 1992.

Meanwhile, on April 1, 1992, appellant filed a petition for writ of mandate in the Fifth Circuit, asking that court to order the recusal of Judge Nowlin. On May 11, 1992, the Fifth Circuit certified to this Court the question whether it had jurisdiction to rule on the recusal petition during the pendency of appellant's appeal in this Court. By order dated June 1, 1992, this Court dismissed that certificate. *In re Slagle*, 112 S. Ct. 2296 (1992). As of September 1, 1992, the Fifth Circuit had not ruled on the petition for writ of mandate.

On July 21, 1992, Judge Nowlin *sua sponte* recused himself from further participation in this case. The Chief Judge of the Fifth Circuit immediately appointed United States District Judge Harry Lee

Hudspeth to serve as the third member of the district court panel assigned to this case.

4. On July 27, 1992, the United States District Court for the District of Columbia ruled that the redistricting plan adopted by the Texas Legislature for the state senate was entitled to be precleared under Section 5 of the Voting Rights Act. *Texas* v. *United States*, No. 91-2383 (D.D.C. July 27, 1992). On August 6, 1992, the Secretary of State of the State of Texas, John Hannah, Jr., issued a directive to state elections officers announcing that the 1992 general elections for the Texas Senate would be conducted pursuant to the newly precleared legislative plan, even though the primary elections had been conducted pursuant to the district court's interim plan. *Terrazas* v. *Slagle*, No. A-91-CA-426 (W.D. Tex. Aug. 21, 1992), slip op. 8-10. Appellees herein filed a motion with the district court to enjoin that directive. The district court granted that motion on August 21, 1992, ruling that the attempt to hold general elections for the state senate using districts different from those established by the court's interim plan (and utilized in the primary elections) violated both Section 5 of the Voting Rights Act and the court's previous orders. Slip op. 11-20.

DISCUSSION

1. Appellant contends (J.S. 9-14) that the district court's interim plan violates the one person, one vote requirement of the Fourteenth Amendment, because the 9.98% population deviation contained in the plan exceeds the "*de minimis* variation" permitted by this Court's decision in *Chapman* v. *Meier*, 420 U.S. 1, 26-27 (1975). See also *Connor* v. *Finch*, 431 U.S.

407, 417-418 (1977). In our view, however, *Chapman* v. *Meier* and *Connor* v. *Finch* are inapposite, because they involved long-term redistricting plans adopted by district courts in the absence of the time constraints imposed by an impending election. In this case, by contrast, the district court was compelled to act promptly because of the State's inability to devise an acceptable redistricting plan and the rapid approach of the primary election season. As this Court has recognized, interim plans adopted shortly before elections must be judged under more lenient standards than those applicable in the usual case. See, *e.g.*, *Mahan* v. *Howell*, 410 U.S. 315, 332 (1973); see also *Connor* v. *Williams*, 404 U.S. 549, 550 (1972); *Watkins* v. *Mabus*, 771 F. Supp. 789 (S.D. Miss.), aff'd in part and vacated in part, 112 S. Ct. 412 (1991).

Even if the district court did err in devising its interim plan, moreover, it would in our view be far too late in the electoral process to remedy that error. Primary elections have been held under the court's plan, and the November 1992 general election is only weeks away. In similar cases of necessity, this Court has previously "authorized District Courts to order or to permit elections to be held pursuant to apportionment plans that do not in all respects measure up to the legal requirements." *Upham* v. *Seamon*, 456 U.S. 37, 44 (1982); see, *e.g.*, *Kilgarlin* v. *Hill*, 386 U.S. 120, 121 (1967); *Reynolds* v. *Sims*, 377 U.S. 533, 585 (1964). Any injury to appellant from this result would be minor, because the court's interim plan will govern only the 1992 elections.[1]

[1] Moreover, it is unclear whether appellant has standing to raise this claim, because he does not allege that he resides in one of the senatorial districts with a substantially larger-than-average population. Cf. *Lujan* v. *National Wildlife Federation*, 110 S. Ct. 3177, 3189 (1990).

2. Appellant seeks to challenge the district court's interim redistricting plan on the ground that Judge Nowlin should have recused himself from participation in this case. J.S. 15-26. Appellant's principal grounds for seeking recusal of Judge Nowlin, however—Representative Pierce's involvement in drawing the interim plan and Judge Nowlin's alleged *ex parte* communications with interested persons—had not been ruled on by the district court at the time appellant filed his notice of appeal in this case, and indeed had not even been raised in that court until the very day the notice of appeal was filed.[2] As a result, those claims are not properly before this Court.

As the Court observed in *Ex parte National Enameling & Stamping Co.*, 201 U.S. 156 (1906), an interlocutory appeal contemplates "a review of the interlocutory order, and of that only. * * * The case, except for the hearing on the appeal from the interlocutory order, is to proceed in the lower court as though no such appeal had been taken, unless otherwise specially ordered." 201 U.S. at 162. Thus, properly construed, appellant's notice of appeal brought before this Court only those matters that had been presented to and ruled on by the district court in issuing the interlocutory orders appealed from. Since appellant had given the district court no opportunity to rule upon his second recusal motion prior to filing

[2] Likewise, appellant's claims that Judge Nowlin's law clerk was previously employed by one of the plaintiffs and that Judge Nowlin improperly retained a private attorney to represent him at a deposition had not previously been submitted to the district court.

his notice of appeal, sound principles of appellate procedure dictate that this Court not address the issues raised in that motion for the first time on appeal. See, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). Moreover, although the district court subsequently ruled on appellant's recusal motions, appellant chose not to appeal from those rulings, which have now become final and unreviewable.[3]

In any event, summary rejection of appellant's claims would be appropriate even if they were properly before this Court. Judge Nowlin has already recused himself from further participation in the

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[3] In his statement of questions presented, appellant asserts that an additional basis for recusal of Judge Nowlin is the fact that "the judge testified as an expert witness for Plaintiff Terrazas in a previous redistricting case" some ten years ago. J.S. i. That ground for recusal, unlike the other grounds asserted in the jurisdictional statement, was presented to the district court in appellant's first motion to recuse Judge Nowlin, which was denied prior to the entry of the orders appealed from here. Thus, that ground for recusal, unlike the remaining grounds asserted by appellant, is properly before this Court.

Appellant does not discuss the significance of Judge Nowlin's prior testimony in the body of his jurisdictional statement, however, except to note that his original recusal motion raising that issue was denied by the district court. J.S. 3. In the absence of any argument or explanation by appellant, it is impossible to conclude that Judge Nowlin erred in refusing to recuse himself merely because he had previously testified as a witness in a different case involving a different redistricting plan. See *United States* v. *Outler*, 659 F.2d 1306, 1311 (5th Cir. 1981), cert. denied, 455 U.S. 950 (1982); *Winters* v. *Travia*, 495 F.2d 839, 841 (2d Cir. 1974); cf. *Laird* v. *Tatum*, 409 U.S. 824 (1972) (Rehnquist, J., in chambers). Accordingly, this aspect of appellant's claim is clearly without merit.

case. Assuming *arguendo* the validity of appellant's second recusal motion, the question remains whether appellant would be entitled to the additional relief he seeks, namely, invalidation of the district court's interim redistricting plan.

As this Court made clear in *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 848 (1988), a violation of 28 U.S.C. 455 does not automatically require that the challenged rulings be vacated. Rather, in determining whether to vacate the recused judge's prior orders, a reviewing court must consider the risk of injustice to the litigants and to third parties and the danger of "undermining the public's confidence in the judicial process." 486 U.S. at 864. Under that standard, appellant would not be entitled to relief in any event.

Primary elections were held under the district court's interim plan in March 1992, and the general election is now only two months away. If the interim plan were to be vacated at this point, substantial delay of the general election would likely be required while the State and the district court attempted to devise an acceptable plan for a new primary and general election at some later date. The inevitable voter confusion and disaffection caused by that delay would do far more to undermine the public's confidence in the judicial system, and would be far more unjust to the candidates who have already undergone a primary election and months of campaigning for the general election, than would a decision to leave the interim plan in place for the 1992 general election. The district court's interim plan will expire by its own terms at the end of the 1992 electoral season, and the State will then be free to

structure future elections in keeping with its legislatively approved plan. Accordingly, the interests of justice would not be served by vacating the district court's interim plan, and thus there is no need for this Court to consider the merits of appellant's claim that Judge Nowlin should have recused himself at an earlier stage of the proceedings.

3. Appellant contends (J.S. 26-32) that the district court's interim plan is essentially the same as the FAIR plan submitted by the Terrazas appellees, and that such litigant-sponsored plans may not be implemented by a court until they have been precleared pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. That contention does not warrant full briefing and argument.

a. Appellant asserts (J.S. 26) that the court plan "is, essentially, the FAIR plan." But the district court did not purport to adopt the FAIR plan. Rather, the court apparently drew its interim plan by modifying S.B. 31 in those areas of the State in which there were likely Section 2 violations and attempting to follow S.B. 31 elsewhere. J.S. App. 25a-26a, 34a-35a.

Appellant relies on the affidavit of Chris Sharman, Senior Redistricting Analyst for the Texas Senate Redistricting Committee, for the proposition that the FAIR plan and the court plan are essentially the same. See J.S. 26 (citing Application for Stay, Appendix, Attachment G). Nothing in that affidavit, however, indicates that the district court actually adopted the FAIR plan *in toto*. To the contrary, that affidavit makes clear that the court's plan incorporates only two districts from the FAIR plan. Application For Stay, Attachment G, ¶¶ 3-5. To be sure, the affidavit asserts that there are only "minor" differences between the two plans in some areas, and that in others the two plans are "very close." *Id.* at

¶ 3. But the affidavit also concedes that in many areas the court plan is only "loosely based" on the FAIR plan, and in others the two plans bear no resemblance to each other at all. *Id.* at ¶¶ 4-5. Thus, even accepting the affidavit at face value, it does not support the conclusion that the district court adopted the FAIR plan.

b. Even if the district court had adopted the FAIR plan, moreover, preclearance of the court's plan would not have been required. The preclearance requirement is triggered only when a "State or political subdivision" covered by Section 5 "enact[s] or seek[s] to administer" a change in election practices. 42 U.S.C. 1973c. Here, the State of Texas did not "enact or seek to administer" the FAIR plan. To the contrary, the State opposed its implementation. Thus, under the plain language of Section 5, preclearance of the FAIR plan was not required.

This Court's decision in *McDaniel* v. *Sanchez*, 452 U.S. 130 (1981), is not to the contrary. In that case, the Court reaffirmed the principle that "the [Section 5] preclearance requirement does not apply to plans prepared and adopted by a federal court to remedy a constitutional violation." 452 U.S. at 138 (citing *Connor* v. *Johnson*, 402 U.S. 690 (1971) (per curiam)). At the same time, this Court concluded that a jurisdiction covered by Section 5 may not circumvent the preclearance requirement by seeking to have a federal court order its preferred redistricting plan into effect. 452 U.S. at 149-151. Accordingly, the Court held that preclearance is required "whenever a covered jurisdiction submits a proposal reflecting the policy choices of the elected representatives of the people." *Id.* at 153.

The FAIR plan was not submitted by a covered jurisdiction; instead, it was submitted by individual

litigants before the district court. Moreover, the FAIR plan clearly does not reflect the policy choices of the State's elected representatives, because the State opposed implementation of that plan and instead submitted its own proposal. Thus, the court's plan is not subject to preclearance under the rule set forth in *McDaniel*.

The guidelines promulgated by the Department of Justice to govern the administrative preclearance process compel the same conclusion. The pertinent guideline provides that\"[c]hanges affecting voting that are ordered by a Federal court are subject to the preclearance requirement of section 5 *to the extent that they reflect the policy choices of the submitting authority*." 28 C.F.R. 51.18(a) (emphasis added).[4] Under that guideline, which "is entitled to considerable deference" (*NAACP* v. *Hampton County Election Comm'n*, 470 U.S. 166, 179 (1985)), it is apparent that the FAIR plan did not have to be precleared, because the FAIR plan was not submitted by the State and does not reflect the State's policy choices.

That conclusion fully comports with the underlying purpose of the preclearance requirement. Section 5 was enacted because some covered States "had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of

[4] The term "submitting authority" is defined to mean "the jurisdiction on whose behalf a submission is made," and the term "[c]overed jurisdiction" refers to "a State, where the [coverage] determination * * * has been made on a statewide basis, and to a political subdivision, where the determination has not been made on a statewide basis." 28 C.F.R. 51.2. The State of Texas is a covered jurisdiction. 40 Fed. Reg. 43,746 (1975).

adverse federal court decrees," and Congress "had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the [Voting Rights] Act itself." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 335 (1966). Thus, the aim of Section 5 is fully achieved when preclearance review is required for changes in voting laws submitted by covered jurisdictions, and there is simply no justification for seeking to extend the preclearance requirement generally to remedies prescribed by federal courts to address adjudicated violations of federal law.

Relying on the Senate Report accompanying the 1975 extension of the Voting Rights Act, however, appellant argues (J.S. 27-28) that all litigant-sponsored plans are subject to Section 5 review. But recourse to legislative history is inappropriate here, because the statutory text is not ambiguous. See *Patterson* v. *Shumate*, 112 S. Ct. 2242, 2248 & n.4 (1992); *Connecticut Nat'l Bank* v. *Germain*, 112 S. Ct. 1146, 1149 (1992); *Toibb* v. *Radloff*, 111 S. Ct. 2197, 2200 (1991); *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 n.3 (1989). As both this Court's decision in *McDaniel* v. *Sanchez* and the applicable Department of Justice guideline reflect, the plain language of Section 5 applies the preclearance requirement only to those litigant-sponsored plans that embody the policy choices of a State or political subdivision covered by Section 5. To the extent that the Senate Report may suggest otherwise, it misinterprets the reach of the statute.[5]

[5] Appellant suggests that *McDaniel* v. *Sanchez* supports his argument in this regard, because the Court's opinion in that case quoted the language from the Senate Report on which

Appellant argues more narrowly (J.S. 28-29) that the FAIR plan is subject to the preclearance requirement because it was submitted by a political party, an entity that can be considered a political subdivision of the State. For most purposes, however, political parties are private entities. And it is only in certain limited circumstances that their conduct may be viewed as that of a covered jurisdiction for purposes of Section 5 review: "[A] change affecting voting effected by a political party is subject to the preclearance requirement: (a) if the change relates to a public electoral function of the party and (b) if the party is acting under authority explicitly or implicitly granted by a covered jurisdiction." 28 C.F.R. 51.7. Thus, "changes with respect to the recruitment of party members, the conduct of political campaigns, and the drafting of party platforms are not subject to the preclearance requirement." *Ibid.* On the other hand, "[c]hanges with respect to the conduct of primary elections at which party nominees, delegates to party conventions, or party officials are chosen are subject to the preclearance requirement." *Ibid.*

When a political party drafts a proposed redistricting plan for submission to a court, it is not acting under authority explicitly or implicitly granted by the State. Such a plan comes to the court with no official imprimatur, and the party submitting the

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he relies. J.S. 27-28 (quoting 452 U.S. at 148-149). The question whether Section 5 requires preclearance of plans submitted by litigants other than covered jurisdictions was not presented or discussed in *McDaniel* v. *Sanchez*, however, and thus that decision's reliance on the Senate Report does not resolve the question presented here. Cf. 452 U.S. at 141 (noting that dictum concerning an issue not presented in a case is not controlling in a subsequent case presenting that issue).

plan is in precisely the same position as any other private litigant. Accordingly, a political party's proposed redistricting plan is not subject to preclearance under Section 5.[6]

c. Appellant alternatively contends (J.S. 30-31) that the district court violated the rule of deference established in *Upham* v. *Seamon*, 456 U.S. 37 (1982), by deviating from S.B. 31 to a greater extent than was necessary to correct that plan's Section 2 violations. In our view, that issue is not "fairly included" within the questions presented by appellant in his jurisdictional statement. Sup. Ct. R. 14.1(a), 18.3; see J.S. i.

In any event, appellant's contention is without merit. The district court stated that it made every effort to follow S.B. 31 except as necessary to correct likely Section 2 violations, and appellant cites no evidence to the contrary. J.S. App. 34a-35a.[7] Moreover,

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[6] That conclusion is particularly inescapable when, as here, the covered jurisdiction actively opposes the implementation of the political party's plan. The result would be different, of course, if a covered jurisdiction itself instigated and participated in the development of a proposed redistricting plan and arranged for it to be submitted to the court by a political party or another nominally private litigant. There is no allegation to that effect in this case.

[7] Appellant contends that the district court erred in revising districts in which "likely," rather than actual, violations of Section 2 had been found. J.S. 30-31. What appellant ignores, however, is the fact that the district court's order granted *preliminary* relief pending a full trial on the merits. See J.S. App. 18a. "[A] preliminary injunction is customarily granted on the basis of * * * evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at a preliminary-injunction hearing." *University of Texas* v. *Camenisch*, 451 U.S. 390, 395 (1981). Thus, a preliminary injunction may properly issue on a show-

in *Upham* v. *Seamon* the Court found error only in the district court's failure to adhere to those portions of the state-approved plan that had not provoked an objection from the Attorney General; here, by contrast, no part of S.B. 31 received Section 5 preclearance, and thus no judicial deference was due.

CONCLUSION

The orders of the district court should be summarily affirmed.

Respectfully submitted.

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ing that the plaintiff "is *likely* to prevail on the merits," *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 931 (1975) (emphasis added); a showing that the plaintiff will *actually* prevail is not required.

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